SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-749

ART THEATRE GUILD, INC., and SHERPIX, INC.,
Petitioners,

v.

LARRY E. PARRISH, THOMAS F. TURLEY, JR., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RALPH J. SCHWARZ, JR.,
22 East 40th Street,
New York, N. Y. 10016.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, N. Y. 10017.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
First National Bank
Building, Suite 2020,
Memphis, Tenn. 38103.
Attorneys for Petitioners.

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In the

Supreme Court of the United States

October Term 1974.

Art Theatre Guild, Inc., and Sherpix, Inc.,

Petitioners,

v.

Larry E. Parrish, Thomas F. Turley, Jr., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioners, Art Theatre Guild, Inc., and Sherpix, Inc. (plaintiffs), respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit filed September 24, 1974, and the opinion on which they are based. That order affirmed the December 1, 1972 order of the District Court, Western District of Tennessee, which denied plaintiffs' motion for a preliminary mandatory injunction seeking a return of the master negative and some ten to twelve prints of the motion picture "School Girl" seized throughout the country but remanded to permit plaintiffs to make copies of the prints.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, and the judgment entered thereon are printed as Appendices A and B. The opinion of the District Court for the Western District of Tennessee was not reported but is printed as Appendix C.

Jurisdiction.

The order, opinion and judgment of the Sixth Circuit was filed on September 24, 1974. This petition for certiorari in this civil action is filed within 90 days of that date (28 U. S. C. 2101 [c]). An application for certiorari time extension for thirty (30) days was filed and granted by Mr. Justice Potter Stewart up through November 23, 1974. That application for time extension, made out of excessive caution, specifically stated that petitioners' filing was in no way a concession that this case "is a criminal case governed by Rule 22(2)" and that this "action is governed by" 28 U. S. C. 2101(c). Hence, this petition is timely filed.

This court's jurisdiction is invoked under 28 U. S. C. 1254(1).

Questions Presented for Review.

1. A federal district court judge in Tennessee in August, 1972, made a preliminary probable cause determination after an evidentiary hearing that the motion picture "School Girl" was obscene and that the seized print be retained. On October 6, 1972, the court held that subpoenas for the master negative and approximately ten to twelve additional prints could *not* require their simultaneous production in Tennessee because it would suppress "the showing of the film" but directed that all material not be altered or destroyed, that a record be kept of the location of all prints and the negative subject to further order of the court.

A. Are First Amendment rights violated where the United States Attorney three weeks after the October 6, 1972 order, uses that same August 1972 preliminary determination of obscenity to seize the master negative, and

ten (10) to twelve (12) prints throughout the country and completely halts the distribution and exhibition nationwide?

B. Are First Amendment rights to return of material vindicated by the right to make copies where the United States Attorney continues to hold the master negative, there is no practical limitation on the United States Attorney's power to repeat the same practice, and the direct laboratory costs of reproducing the prints are approximately $10,000?

2. Is 18 U. S. C. 371 as applied overbroad under the First Amendment in purportedly justifying nationwide seizures because the alleged unlawful conspiracy object is exhibition throughout the United States?

Constitutional Provisions and Statutes Involved.

First Amendment; due process clause Fifth Amendment; 18 U. S. C. 1462 and 18 U. S. C. 371 (printed in Appendix D).

Statement of the Case.

A. The order to show cause seizure and preliminary evidentiary determination of obscenity.

On May 26, 1972, on the application of respondents (hereafter defendants), the District Court in Tennessee issued an order to show cause directing the possessors of the film "School Girl" to show cause why the film should not be declared obscene. A print of the film was seized by the United States Marshal and brought to court. The seizure of that print is *not* involved in this case.

A preliminarily probable cause evidentiary hearing was held. The court in August, 1972, found the film obscene and directed the seized print be retained by the government.

In September, 1972, Art Theatre Guild and one of its employees were indicted for violation of 18 U. S. C. 1462.

In September, 1972, the Grand Jury issued various subpoenas to exhibitors and subdistributors throughout the country and the laboratory to produce in Tennessee copies of the film prints and master negative together with business records concerning "School Girl."

B. The civil action to enjoin enforcement of the subpoenas: Court on October 6, 1972, quashes subpoenas to produce prints and negative but adequately protects government.

Plaintiffs in September, 1972, filed a civil complaint and motion for a preliminary injunction seeking *inter alia* declaratory judgment and injunctive relief. That complaint, paragraph 11A, complained specifically about the subpoenas directed to the laboratory (Movie Lab, Inc.) which held the master negative and eight named theatres and a subdistributor located throughout the country and further alleged the subpoenas were violative of the First Amendment.

Defendants objected and claimed the production of the prints and negative was necessary to continue investigation of a nationwide conspiracy to violate 18 U. S. C. 1462.

On October 6 the court quashed the subpoenas and ruled that the "*effect of the subpoenas would be to suppress this film.*"

As the Sixth Circuit stated (App. A, p. 21) the District Court further held:

> "Now, even if a conspiracy exists, this court does not believe that it should be the cause of suppressing the showing of this film."

As the District Court December 1, 1972 opinion states (App. C, p. 33) the District Court on October 6, 1972, fur-

ther directed that the persons and firms subpoenaed should retain the prints and negative "in their actual or constructive possession," not alter or destroy them and keep a record of where the prints were sent for production upon further order of the court (App. C, p. 33). This order, sometimes for convenience referred to as holding "subject to subpoena," amply protected the government.

Assuming the government needed any additional prints for an investigation defendants could have arranged for an orderly and scheduled production of prints. Thus plaintiffs and exhibitors would be free to continue the distribution and exhibition (subject to a minimal interference) instead of the blanket suppression which is a necessary consequence of ten simultaneous subpoenas.

C. The nationwide seizures of prints and negative October 31-November 7, 1972.

Defendants however by multiple search warrants and seizures did exactly what the District Court held they could not do by subpoenas. *Based upon the August, 1972 adversary but preliminary evidentiary probable cause determination by one judge in Tennessee defendants thereupon obtained search warrants in New York (where the master negative was located), New Jersey, Minnesota, and California and seized the master negative and nine (9) to ten (10) prints throughout the country.*

That ended the nationwide distribution and exhibition.

Plaintiffs filed an amended complaint and moved for a preliminary mandatory injunction (i) for a return of the prints and master negative (but to be held subject to subpoena) and (ii) to enjoin future seizures. The District Court by order of December 1, 1972, denied the motion holding plaintiffs had not proved bad faith (App. C, p. 41).

Thereafter in February, 1973, by superseding indictment plaintiffs herein and some 23 other individuals and corporations were indicted for violation of 18 U. S. C. 1462

and 18 U. S. C. 371 for a nationwide conspiracy the alleged unlawful object of which was to exhibit the film throughout the United States. In other words the alleged obscenity of the film in forty-nine states other than Tennessee is being used as the justification for a nationwide seizure and holding of the prints and negative in Tennessee.

The appeal to the Sixth Circuit was perfected and argued November, 1973.

D. The Sixth Circuit order and judgment of September 24, 1974.

The Sixth Circuit agreed with plaintiffs that the action and motion for return must be treated separate and apart from the criminal prosecution and that this action is a separate civil action.

This must be. For in the area of the First Amendment the independent right and remedy of return to vindicate a First Amendment violation is and must be separate from the First and Fourth Amendments' exclusionary rule on the motion to suppress in the criminal case.

The Sixth Circuit held that *Heller v. New York*, 413 U. S. 483 (1973), did not address itself to "a nationwide conspiracy case" and stated that *Hamling v. United States*, U. S. , 41 L. Ed. 2d 590 (1974), "touches on this problem" (App. A, p. 26).

The Sixth Circuit held on the basis thereof that the case should be remanded to permit plaintiffs to make copies of the film prints (App. A, p. 27) *but of course permitted the government to keep the negative and all prints seized.*

We note that the *Hamling* conspiracy count did not allege that the material or brochures involved in *Hamling* were obscene in 50 states and *Hamling did not involve nationwide seizures.*

Basis for Federal Jurisdiction in Court of First Instance and Raising of Federal Questions.

The complaint in the District Court invoked the jurisdiction of the federal court under 28 U. S. C. 1331 and the First and Fourth Amendments, and sought a declaratory judgment and injunctive relief.

First Amendment violations were asserted in the original complaint, in the November, 1972 amended complaint, and the November, 1972 moving papers for a preliminary injunction and on appeal.

The original complaint and amended complaint raised the issue of First Amendment overbreadth of 18 U. S. C. 1462 as applied and impliedly raised the issue of overbreadth of 18 U. S. C. 371.

In view of the Sixth Circuit reliance on *Hamling, supra*, we are now specifically raising the issue of overbreadth of 18 U. S. C. 371 as applied.

REASONS FOR GRANTING THE WRIT.

I.

The Sixth Circuit precedent will permit any United States attorney by preliminary determination of obscenity to halt nationwide distribution and exhibition long before final adjudication. The Sixth Circuit solution of the right to make copies does not and will not cure the prior restraint in this or any similar case and does not comport with *Heller*.

Summary of Point I.

The Sixth Circuit opinion will enable any United States Attorney to use a preliminary probable cause evidentiary

finding of obscenity by a federal judge or magistrate to completely halt the nationwide distribution and exhibition of a film long before any final judgment of obscenity. That is what happened. This is a clear unconstitutional prior restraint (I-A).

The remand solution of the Sixth Circuit (making copies) positively does not and will not cure the First Amendment violation in this or any similar case. It does not comport with Heller and the dangers of this precedent are enormous (I-B).

The government was and is protected by the October 6, 1972 court order, that the master negative and all prints be held "subject to subpoena" particularly where the government already had a copy of the print (I-C).

The Sixth Circuit correctly held this civil action is not a criminal case but is independent thereof (I-D).

I-A

Heller, supra, 413 U. S. at 489, repeatedly cites *United States v. Thirty-Seven Photographs*, 402 U. S. 363 (1971), and *Freedman v. Maryland*, 380 U. S. 51 at 58-59 (1965), and indeed in footnote 5 (413 U. S. at 489, nt. 5) requotes *Freedman* emphasizing that there cannot be any substantial restraint in advance of "a final judicial determination on the merits." *Accd Paris Adult Theatre I v. Slaton*, 413 U. S. 49 at 55 (1973), "no restraint * * * until after a full adversary hearing and a *final* judicial determination." (Italics supplied.)

The adversary hearing concerning "School Girl" was undertaken in August, 1972, on the premise of pre-*Heller* decisions that an adversary hearing was required for an evidentiary seizure of one copy of a film print, e. g., *Astro*

Cinema Corp. v. Mackle, 422 F. 2d 293 (2d Cir. 1970); *Tyrone, Inc., v. Wilkinson*, 410 F. 2d 639 at 641 (4th Cir. 1969); *Demich, Inc., v. Ferdon*, 426 F. 2d 643 (9th Cir. 1970), vacated and remanded *sub nom. Ferdon v. Demich, Inc.*, 401 U. S. 990 (1971), for reconsideration under *Perez v. Ledesma* (citation omitted), i. e., on *Younger* grounds.

The hearing in this case was preliminary and *evidentiary* only, as the lower court and Sixth Circuit both said. It was held under the supposed authority of F. R. Crim. P. 41 (e), where the test is probable cause. See also, *Tyrone, Inc., supra*, 410 F. 2d at 641, adversary hearing not "fully matured action at law"; *Demich, Inc., supra*, 426 F. 2d at 646, can rebut "the showing of probable cause."

The evidentiary hearing and finding of obscenity based thereon was the basis for retaining the first print initially seized. The propriety thereof is not involved in this action.

Motion pictures including sexually oriented films are generally distributed nationwide. It is alleged in the complaint that the picture was exhibited in over 90 cities. There were 22 prints along with the master negative. To seize 9 to 10 additional prints throughout the country constituting roughly 40 to 50 percent of all of the print inventory and the master negative from which all prints are made on the basis of a preliminary evidentiary finding of obscenity is to effect a total and complete unconstitutional prior restraint. It is particularly egregious where the government already had a copy of the film print which had been exhibited in Memphis, Tennessee.

The lower court held on October 6, 1972, that the preliminary "judgment" of obscenity and investigation of a national conspiracy would not justify subpoenas for simultaneous production of the film prints and master negative in Tennessee because it would suppress the film.

Three weeks thereafter the defendants by seizure did exactly what the lower court held they could not do by subpoena. *The distribution and exhibition of "School Girl" was brought to a total and complete halt nationwide.*

This is a clear First Amendment violation.

I-B

The *Heller* solution of making copies where *one print* is seized *but the master negative is not seized* and there is *one* theatre makes sense.

The Sixth Circuit's adaptation of *Heller* (i. e., making copies) *is not justified in this case, does not comport with Heller, will not cure the First Amendment violation and will not work in this or in any similar case.*

The seizure and retention of the master negative and the 9 or 10 prints by defendants was allegedly justified because of the grand jury investigation into a *national* conspiracy.

Let us assume, in accord with the Sixth Circuit mandate, that additional print copies had been made either before or after indictment. Nonetheless all of the subdistributors, the warehouses at which prints are stored and all exhibitors would still be parties to the same alleged national conspiracy. The alleged justification for seizing the prints in the first place would be equally applicable to the seizure of future prints. The right to make copies does not put a halt to multiple seizures. *The Sixth Circuit remand solution of the right to make copies simply validates the massive multiple nationwide seizures of prints and negative and insures it can happen in any case.**

*In this case we note five print copies were seized from one warehouse.

Under those circumstances no exhibitor will book the exhibition of a film, and incur the cost of advertising the film and commence the exhibition thereof, where he knows that FBI agents armed with a search warrant based on the preliminary determination of one federal court can come in and seize the film at any time.

That is exactly why the distribution and exhibition came to a complete halt on or about November 1, 1972, a fact not open to dispute.*

The essence of *Heller* is that an evidentiary seizure of one film print which causes a minimal interference violates no First Amendment rights where there is no showing the seizure prevents "continuing exhibition" and there is only "*a minimal* interference with public circulation pending litigation" (413 U. S. at 492, 493). (Italics supplied.)

The essence of the Sixth Circuit holding applied to this and any national conspiracy case does exactly the opposite. It *validates the seizure of the master negative* and 40 to 50% of the print inventory, *and* an initial *maximum* interference, *and* puts no limitation on continuing future seizures.

In addition, the cost burden and practical difficulties of reproducing prints where the government controls the master negative makes the Sixth Circuit solution unrealistic and unworkable for this reason alone.

Obviously, commercially acceptable release prints (called prints) can be made only from the master negative.

*The indictment in *United States v. Gerber, Sherpix, et al.*, alleges a conspiracy up to November 1, 1972. Obviously, the government knew there could be no alleged conspiracy after that date because no exhibitor would book the film.

Where, as in *Heller*, there is only one print seized the replacement can generally be achieved with minimal problems. Firstly, generally, other prints are available. Secondly, the negative without further checking or processing is readily available for striking a commercially acceptable release print because the negative has not been seized (see *Heller*, 413 U. S. at 493, nt. 10). Thirdly, the cost of making one print, now approximately $720 per print, is not prohibitive.

Assuming *arguendo* in this case the negative has not been irretrievably damaged because of absence of storage in controlled laboratory conditions, we have the following. The laboratory (Movie Lab in New York) *must* first make a check print or answer print to make sure that commercially acceptable release prints can be made at all. That is a cost which varies from $1,800 to $3,000.

The release prints cost $720 per print, 10 prints, $7,200. The basic laboratory production cost is $10,000 aside from the distributor's overhead. Compelling a distributor to incur a direct laboratory cost of $10,000 to continue distribution does not comport with *Heller* and it is *not* a minimal interference.

I-C

While copying in this or similar cases will not satisfy First Amendment requirements (I-B, *supra*) the October 6, 1972, ruling of the lower court amply protected the interests of the government in preserving evidence for investigation or trial.

That October 6, 1972 ruling, set forth in the December 1, 1972 opinion of the District Court (App. C, p. 33), and repeated in essence in the Sixth Circuit opinion (App. A, pp. 21, 22) directed that all persons and corporations subpoenaed hold the material in their actual or constructive possession subject to further production in Tennessee, i. e., the prints and negative were held subject to the

executed subpoena process and the further order of the court.

That ruling protected the government but enabled the plaintiffs to continue distribution.

All that the defendants had to do for their Grand Jury investigation was to make an intelligent scheduling of the production of the film prints in Tennessee even assuming they needed them at all. The corporate exhibitors and subdistributors who were subpoenaed are not going to risk contempt of court and obstruction of justice charges by tampering with the prints. Assuming *arguendo* the defendants were not satisfied with the October 6, 1972, decision they should have appealed instead of taking the law into their own hands.

In any event the October 6, 1972, order of the lower court amply protected the interests of the defendants and the government for investigation and trial.

I-D

The Sixth Circuit correctly held that this civil action was an action independent of the criminal prosecution.

A seizure by law enforcement officials of alleged obscene materials in connection with criminal prosecutions but in violation of First Amendment rights always did, and *Heller* made clear it still does, give rise to two separate and independent rights:

(i) the independent right to mandatory injunctive relief for a return of the material seized for violation of the First Amendment and

(ii) the application of the exclusionary rule in the criminal prosecution for violation of the First and Fourth

Amendments. *Heller, id.* at 493, nt. 11; *Cinema Classics, Ltd., v. Busch*, 339 F. Supp. 43, 48, 50 (C. D. Cal. 1972) (three judge ct.), aff'd *sub nom. Busch v. Cinema Classics, Ltd.*, 409 U. S. 807 (1972), preliminary injunction granted directing the return of material, less a "small amount needed as evidence of possible criminal violation" obviously interrelated matters of First and Fourth Amendment and application of the exclusionary rule left for the criminal prosecution; *American News Company v. Ladas*, 454 F. 2d 1237 at 1240 (6th Cir. 1972), *id.* at 1240, absence of bad faith immaterial on application for mandatory injunctive relief and matters of Fourth Amendment admissibility in evidence of material seized left for criminal prosecution; *Turoff, Inc., supra*, 410 F. 2d at 641, nt. 4, preliminary injunction order affirmed; film print returned but copy to be made available; comment note 4 shows that the First and Fourth Amendment exclusionary rule application left for the criminal prosecution.

Aside from First Amendment cases a separate civil plenary action and proceeding by way of a preliminary injunction is a proper and appropriate action and procedure against officials and offices of the United States to obtain return of property illegally seized by agents of the federal government, or by federal prosecutors, even where the seizure occurs by the federal prosecutor for use in a criminal prosecution. The court may not always grant the relief, but the court has the unquestioned power to rule on the matter independent of the criminal action. *Cogen v. United States*, 278 U. S. 221, 225, 226 (1928); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 354-355, 358 (1931); *Perlman v. United States*, 247 U. S. 7, 13 (1918); *Rea v. United States*, 350 U. S. 214, 217 (1956); *Dowling v. Collins*, 10 F. 2d 62 (6th Cir. 1926); *Lord v. Kelley*, 223 F. Supp. 684 (D. C. D. Mass. 1963), appeal dismissed on other grounds 334 F. 2d 742 (1st Cir. 1964).

The Sixth Circuit correctly held that this civil action was a separate civil action* independent of the criminal prosecution.

II.

18 U.S.C. 371 is overbroad as applied to justify the seizure of the negative and film prints throughout the country.

The initial indictment of September, 1972, against Art Theatre Guild, Inc., and Tom Berman and the superseding indictment of February, 1973, against Gerber, Sherpix, *et al.*, were both returned when the "national community standards" rule was in effect. The February, 1973, indictment charges in Count I that from August 1, 1971, through November 1, 1972, approximately twenty-five individuals and corporations conspired to knowingly use common carriers to transport "School Girl" in violation of 18 U. S. C. 1462 and that the alleged unlawful ultimate object of the conspiracy was "to profit financially the defendant and others by the public exhibitions of said (allegedly obscene) motion picture film to paying patrons of theaters *throughout the United States*." (Parentheses and italics supplied.)

The plaintiffs claimed from the outset that even a national community standard rule did not justify a preliminary evidentiary determination of obscenity by one federal court in Tennessee being used to authorize the seizure

*An application for certiorari time extension was filed. That application stated specifically that we do not "in any way" concede that this is a criminal case and that "this action is governed by 28 U.S.C. 2101(e)" (typographical error corrected). No time extension is required. This petition is timely filed.

of the master negative and 40 to 50% of print inventory *throughout the county* for the investigation, or trial evidence in Tennessee to prove that the film exhibition was unlawful throughout the country. This would quickly lead to impermissible national censorship by the federal government. In short, 18 U. S. C. 371 as applied to justify seizures is overbroad.

The validity of this argument should not be open to doubt in light of *Miller v. California*, 413 U. S. 15 at 32 (1973); see also, *Jenkins v. Georgia*, U. S. , 41 L. Ed. 2d 642 at 648 (1974). *Hamling v. United States*, U. S. , 41 L. Ed 2d 590, relied on by the Sixth Circuit does not support its position.

Tests (a) and (b) of *Miller* are firstly fact issues to be determined in accordance with what the *local* community tolerates, *Miller*, *id.* at 32, and the understanding of the communities "from which" the jurors come. *Jenkins*, *id.* at 648. Thus, as *Miller* stated in essence (*id.* at 32), changing only the names of the areas, what may not be acceptable in Maine or Tennessee might be perfectly acceptable in New York City or San Francisco.

It is presently a fact that there is not and has not been in San Francisco for over a year and a half any enforcement of the obscenity laws against consenting adults. That is the local community standard.

A statute is overbroad if it sweeps within its reach that which is permitted as well as that which may be proscribed. *Keyishian v. Board of Regents*, 385 U. S. 589 at 609 (1967); *Gooding v. Wilson*, 405 U. S. 518 at 522 (1972).

18 U. S. C. 371 as applied to this case to justify the nationwide seizures is clearly palpably overbroad whether the local standard rule is applied statewide or on a lesser area basis. It is not the business of a federal court or federal grand jury in Tennessee to be investigating or determining whether this or any other film is obscene in California, Pennsylvania (where there is no obscenity law), Illinois, New York City and every state and city in the country. This is a matter of fact and law to be determined by this court and jury in its area. The Tennessee federal court may not constitutionally determine a film shipment from New York to San Francisco (which does not touch Tennessee) is obscene in San Francisco when as a matter of fact and law it is not obscene in San Francisco.

There is no question but that the conspiracy count against the defendant in the criminal case is not limited to shipments into Tennessee or out of Tennessee. The alleged overt acts set forth in Count One of the indictment include shipments by subdistributors which do not touch Tennessee at all and have nothing to do with Tennessee.

The Sixth Circuit relied in part on *Hamling*. But the charging part of the conspiracy count in the *Hamling* indictment (Appendix F) does not charge that the object of the conspiracy was to profit the *Hamling* defendants by sales of any material at retail stores throughout the country.

And *Hamling did not involve nationwide seizures and nationwide seizures were not necessary for the government to prove the case in Hamling.*

The charging part of the conspiracy count in *United States v. Gerber, et al.*, charges as the unlawful object the public exhibition of the film at "*theaters throughout the*

United States." The defendants are not entitled to draft a conspiracy indictment which is an overbroad violation of the First Amendment and then use their own abuse of 18 U. S. C. 371, and the inherent overbreadth of 18 U. S. C. 371 to justify their seizures.

18 U. S. C. 371 and the conspiracy count may not be applied and used to permit Tennessee federal court to consider interstate shipments and exhibitions which have nothing to do with Tennessee. Hence 18 U. S. C. 371 may not be applied and used to permit seizures of the master negative and prints throughout the country.

CONCLUSION.

The writ of certiorari should be granted.

Respectfully submitted,

RALPH J. SCHWARZ, JR.,
22 East 40 Street,
New York, N. Y. 10016
(212) MU-6-8160.

EDMUND C. GRAINGER, JR.,
501 Fifth Avenue,
New York, New York 10017
(212) 697-2710.

FRIERSON M. GRAVES, JR., and
MICHAEL F. PLEASANTS,
2020 First National Bank Building,
Memphis, Tennessee 38103
(901) 525-8231.

Attorneys for Petitioners.

APPENDIX A.

No. 73-1422

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

ART THEATRE GUILD, INC., and SHERPIX, INC.,

Plaintiffs-Appellants,

v.

LARRY E. PARRISH, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Tennessee.

Decided and Filed September 24, 1974.

Before: PHILLIPS, HARRY, Chief Judge; PECK, JOHN W., Circuit Judge; *JOINER, CHARLES W., District Judge.

JOINER, District Judge. The plaintiffs-appellants in this case seek reversal of the District Court's Order refusing to order the return of all ten (10) or twelve (12) prints of a motion picture seized pursuant to search warrants from various persons throughout the United States. Defendants contend they have a right to retain the prints as evidence in the prosecution of the plaintiffs-appellants for violation of federal obscenity laws and for conspiracy

*The Honorable Charles W. Joiner, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

to violate them. The case is affirmed but remanded to the District Court to carry out the mandate set forth in this opinion.

Background.

An Order to Show Cause was issued by the District Court in Memphis, Tennessee, ordering the possessors of the motion picture "Schoolgirl" to either bring the film forthwith to the District Court, or, alternatively, to give the film to the United States Marshal for its transportation to the District Court, and to come and show cause, if any, why the film should not be declared obscene. The film was then in the possession of Film Transit, Inc., having completed a playdate of approximately eleven (11) weeks at the Studio Theatre, Memphis, Tennessee, and was in the process of being shipped from Tennessee to New Jersey.

When the film was physically produced in open court counsel, now before this court representing plaintiff Art Theatre Guild, Inc., appeared demanding return of the film but without stating whose interest he represented. The court viewed the film, but on motion of the attorney demanding return of the film, adjourned the adversary hearing in order to allow an opportunity for anyone having an interest in the film to assemble proof on the issue of obscenity. No person subject to an *in personam* order of the court offered to or requested return of the film at that point, and the court kept it in order not to be divested of its power and control over the subject matter or *res* of the controversy.

An evidentiary hearing was held and the court found the film obscene and directed that the seized print be retained by the government.

Thereafter, an indictment was returned against Art Theatre Guild, Inc., and one of its executive officers, charging, in one count, a violation of 18 U.S.C. § 1462 for using

a common carrier to ship the motion picture "Schoolgirl" to Memphis, Tennessee. The grand jury investigation continued, and it concluded the issuance by the grand jury of numerous subpoenas. Among those were subpoenas to various persons and corporate entities requiring them to bring prints and negatives, among other things, to Memphis from various places throughout the nation.

Later, the appellants Art Theatre Guild, Inc., and Sherpix, Inc., filed a complaint against Larry E. Parrish, an Assistant United States Attorney, and Thomas Turley, the United States Attorney, seeking declaratory relief, injunctive relief, and damages. The complaint alleged that after the conclusion of the hearing, at which time the judge ruled the motion picture "Schoolgirl" was obscene as a preliminary matter, Mr. Parrish, the Assistant United States Attorney, caused approximately (30) *subpoena duces tecum* to be issued and served throughout the United States. These subpoenas required the production not only of all business records but the master negative and all prints of the motion picture "Schoolgirl."

The court, within ten (10) days, heard the motion for preliminary injunction and ruled that because the motion for preliminary injunction raised issues that were addressed to the subpoenas that had been issued for the grand jury, the court would consider the motion for preliminary injunction as a motion to quash the subpoenas. It then quashed the subpoenas as to the production of the motion picture prints and said that "The effect of the subpoenas would be to suppress this film." The court further said:

> "Now, even if a conspiracy exists, this court does not believe that it should be the cause of suppressing the showing of this film."

As a condition of the granting of the motion to quash, the court directed that the films not be altered or de-

stroyed and directed that the parties subpoenaed keep a record of the location of all prints and the master negative, and directed that they be held and accounted for subject to the further order of the court.

Subsequent to this ruling, Mr. Parrish, Assistant United States Attorney, in cooperation with Mr. Hester of the Memphis FBI office, and with the cooperation of various FBI agents throughout the country, obtained a number of search warrants. Within the next few days, approximately ten (10) to twelve (12) prints of the motion picture "Schoolgirl," and the master negative of the film, were seized throughout the country. The warrants were issued by United States Magistrates in Newark, New Jersey; Camden, New Jersey; Minneapolis, Minnesota; and Los Angeles, California.

A motion for a preliminary injunction was immediately filed requesting the return of the prints and negatives seized as a result of the search warrants. It also requested an injunction against any further seizures or suppressions of the motion picture by use of search warrants, grand jury subpoenas, or any other method of procedure. Within thirty (30) days, the District Court in a Memorandum Decision and Order denied plaintiffs' motion seeking a return of the seized material. It is an appeal from that order which is before this court.

Two and one half months later, the grand jury returned an indictment which superseded the original indictment returned against Art Theatre Guild, Inc. The subsequent indictment names approximately twenty-five (25) corporate and individual defendants, including both plaintiffs in this case. It again alleges violations of 18 U.S.C. § 1462, but now includes an alleged violation of 18 U.S.C. § 371, charging a conspiracy involving the national distribution of the motion picture "Schoolgirl."

Discussion.

The problems raised in this case bring into conflict competing policies of federal law. On the one hand, the defendants contend they are entitled to keep the evidence they have lawfully acquired in order to prosecute the plaintiffs-appellants for violations of the law. On the other hand, the plaintiffs-appellants contend they are entitled, in the exercise of the rights of free speech and press, to have the motion pictures and masters returned to them. Both the plaintiffs-appellants and the defendants-appellees have seized the policy most favorable to their position, and the plaintiffs-appellants have asked this court to resolve the dispute in their favor by reversing the trial court ruling refusing to return the films. Both policies are entitled to support, and conflict between them in their application is to be avoided if it can be done.

The subsequent indictment involving not only the plaintiffs-appellants but also a number of other persons throughout the United States on questions involving the transportation, shipment and receipt of the motion pictures in interstate commerce and conspiracy involving the same shipments, etc., point up the need to consider the propriety of responding affirmatively, without thought of the possible consequences to that criminal litigation, to the plaintiffs-appellants' demands in a civil action for the return of the films.

The defendants first seek refuge in the policy enunciated in *DiBella v. United States*, 369 U. S. 121 (1961). The defendants view this proceeding as no more than a mere guise for an attempt to suppress evidence to be used in the criminal proceedings brought against these and other defendants in the subsequent indictment. *Cogen v. United States*, 278 U. S. 221 (1929). Review of an order refusing to return property was not permitted in *DiBella* unless the demanded return of the property was

completely independent from any criminal proceedings. The Supreme Court sought to define independent by stating: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." 369 U. S. at 131-132.

Undoubtedly the present motion is indeed tied to a criminal proceeding now pending in the Western District of Tennessee. *United States of America v. Gerber, et al.*, Criminal No. 73-45. Count one of the indictment in that action alleges a conspiracy, on a nationwide scale, to violate 18 U.S.C. § 1462, all in violation of 18 U.S.C. § 371. The indictment further alleges violations of 18 U.S.C. §§ 2 and 1462.

This is precisely the problem to which *DiBella* addresses itself, to wit, the piecemeal litigation of criminal proceedings. Memories fade, witnesses become unavailable and perishable evidence disappears as the mills of justice slowly grind. These precise evils are what *DiBella* sought to prevent, and were it not for the competing policy urged by the plaintiffs-appellants, and examined below, this appeal would be dismissed forthwith.

The policy of the law on which plaintiffs-appellants rely is stated in *American News Company v. Ladas*, 454 F. 2d 1237 (6th Cir. 1972), when this court affirmed an order returning books seized as a result of a massive seizure that were not essential to the criminal prosecution of obscenity. *Heller v. New York*, 413 U. S. 483 (1973), opted for the freedom to display films there involved on the same theory as did *Ladas* with the books, but permitted the retention by the prosecution of enough copies for evidential purposes.

The narrow issue before the Supreme Court in *Heller* was "whether a judicial officer authorized to issue warrants, who has viewed a film and finds it to be obscene, can issue a constitutionally valid warrant for the film's seizure as evidence in a prosecution against the exhibitor,

without first conducting an adversary hearing on the issue of probable obscenity." 413 U. S. at 484. The narrow holding on that narrow issue was "there is [no] absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. . . . In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution." *Id.* at 488.

Opinions of the Supreme Court, however, are more than narrow issues and narrow holdings. Rather, they are guidelines for lower courts to follow as they preside over the multiplicity of problems which arise in the Nation's diverse state and federal courts. As such the opinions must be looked to in their entirety as the Nation's many judges work to breathe life into law as enunciated by the Nation's highest arbitrator of Constitutional issues.

For guidance in this case, the Court in *Heller* made the following statement:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the

> court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." [Footnotes omitted.] *Id.* at 492.

This court must fashion a decision which gives recognition to both *DiBella* and *Heller*. On the one hand this entire matter could simply be remanded with directions to raise in the criminal proceedings the issues fostered by the *Heller* decision. But mitigating against that is the entire thrust of *DiBella*, how best to prevent delay. If the court remanded these issues for them to be raised in the criminal proceedings, the result would be precisely that, delay. The reality of judicial economy and the spirit and intent of *DiBella* dictate that this court resolve the issues in light of the *Heller* decision.

Since *DiBella* predated *Heller*, it obviously could not have given consideration to the dictum found therein. The decision takes no account of the Supreme Court's statement, that one copy of a film is sufficient to preserve the evidence needed in the prosecution of an obscenity offense. *Heller*, however, does not address itself to the problems presented in the prosecution of a nationwide conspiracy case.

The Supreme Court in *Hamling v. United States*, No. 73-507, June 24, 1974, touches on this problem and indicates how a district judge sitting in one district can handle the "contemporary community standard" requirement when faced with a federal prosecution and the need to consider its application in several districts.

In this case the trial judge held an evidential hearing on the preliminary question of obscenity and found the film to be obscene. Based on that finding search warrants were issued and the copies of the film were seized. This is not a case analogous to *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964), or *Marcus v. Search War-*

rant, 367 U. S. 717 (1961). As stated in *Heller*, "the requirements of *A Quantity of Books* and *Marcus* are fully met." *Heller, supra*, 413 U. S. at 491. There was an ". . . independent judicial determination of obscenity by a neutral detached magistrate . . . [and] the seizures [were] made to preserve evidence for a criminal prosecution." *Heller, supra, Id.* at 491, n. 7.

The trial judge found that Sherpix, Inc., a plaintiff-appellant in this case, was the owner of the film and that the adversary hearing on obscenity was binding on it. The court declined to interfere with the efforts of those charged with enforcing the law from obtaining "evidence in furtherance of *bona fide* investigations and prosecutions for violations of the United States laws." The court did not abuse its discretion in refusing to interfere.

On remand, if it appears to the trial court "that other copies of the film are not available to the exhibitor the court should permit the seized film to be copied," *Heller, supra, Id.* at 492, at their own expense. The defendants are, of course, entitled to the safeguards set forth in *Heller* as to the copying of the film which is being preserved as evidence in a criminal proceeding.

This directive preserves the policy of the law permitting the government to gather evidence for use in prosecution of violations of the law, while at the same time permitting the free exercise of the First Amendment rights of the Constitution.

The case is affirmed but remanded to the District Court to supervise the process of permitting, if necessary, the appropriate plaintiff-appellant to make copies of the seized films without destroying the government's right to retain the evidence it deems necessary for its case, and to determine as provided in the trial court memorandum if any material seized "is not relevant and necessary evidence to the prosecution."

So ordered.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

FOR THE SIXTH CIRCUIT.

No. 73-1422

ART THEATRE GUILD, Inc., and SHERPIX, Inc.,

Plaintiffs-Appellants,

v.

LARRY E. PARRISH, *et al.*,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and JOINER, District Judge.

Judgment.

APPEAL from the United States District Court for the Western District of Memphis.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Memphis and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed and the case is remanded for further proceedings.

It is further ordered that Defendants-Appellees recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s JOHN P. HEHMAN
Clerk

Issued as Mandate:
Costs: None

A True Copy.
Attest:

JOHN P. HEHMAN, Clerk

APPENDIX C.

December 1, 1972 Decision.

IN THE

UNITED STATES DISTRICT COURT,

WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION.

ART THEATRE GUILD, Inc., and SHERPIX, Inc.,

Plaintiffs,

vs.

LARRY PARRISH and THOMAS TURLEY,

Defendants.

Civil Action No. C-72-337

Memorandum Decision.

This ruling pertains to an application for a preliminary injunction whereby the plaintiffs seek injunctive relief requiring the defendants to return certain prints and negatives of the motion picture "School Girl" and an order restraining the defendants from attempting to gain possession of other prints of the same movie by subpoenas, search warrants or other process. In the complaint the plaintiff, Art Theatre Guild, Inc. (hereinafter called "Guild") is identified as an Ohio corporation which maintains a booking office in New York, New York and owns and operates approximately forty theatres throughout the United States. The plaintiff Sherpix, Inc. (hereinafter called "Sherpix") is identified as an Ohio cor-

poration which is the owner of all rights to the motion picture "School Girl" and is the distributor of the same. The defendants Parrish and Turley are sued individually and in their capacity as an Assistant U. S. Attorney and the U. S. Attorney, respectively, for the Western District of Tennessee.

In this ruling it is necessary to incorporate a factual account of other proceedings which occurred in the Court of this district pertaining to this film.

On Friday, May 26, 1972, the defendant Parrish filed a proceeding in this Court which was styled *United States of America vs. Two Cartons Containing One Motion Picture Film Entitled "School Girl"*, Civil Action No. 72-179. In that proceeding the United States applied for an order to show cause why the film "School Girl" should not be seized for an investigation and possible prosecution under 18 U.S. Code §1462, which prohibits knowingly transporting in interstate commerce obscene motion picture films. On that *ex parte* application the Court entered a show cause order whereby the Marshal for this District was directed to obtain possession of the film and bring it to this Court sealed at 9:30 A.M. on Monday, May 30, 1972, where those in possession of the film would then and there show cause why the film should not be declared obscene and a warrant executed authorizing the seizure of the film. Copies of the Order to Show Cause were ordered served specifically upon the Manager of the Studio Theatre, 535 South Highland, Memphis, Tennessee, and any other person in whose custody or possession the film was found and the person in charge at Bonded Film Storage Company, Fort Lee, New Jersey.

On May 30, 1972, Michael Pleasants, Esq., an attorney of the Memphis Bar appeared in behalf of the film. The Court indicated that an adversary hearing was being made available with regard to the issue of whether or not the film was obscene. Thereupon the Court adjourned to a screening studio and viewed the film in the pres-

ence of counsel for the United States and Michael Pleasants, Esq. On the application of Michael Pleasants, Esq., the adversary hearing was further adjourned in order for counsel to obtain and present oral testimony pertaining to the issue of obscenity with regard to the film. It should be noted that Michael Pleasants, Esq., from the inception of the case has objected to the procedure whereby possession of the film was obtained and presented to the Court. Exceptions to the Court's overruling of these objections were repeatedly reserved. On further application of Michael Pleasants, Esq., the evidentiary hearing was reset until August 28, 1972, in order to have witnesses for the claimant to the film testify.

On June 7, 1972, the Guild appeared in the cause as a claimant to the film and, therefore, was a participant in the subsequent evidentiary hearing on the issue of obscenity. This hearing commenced on August 28, 1972 and continued for three days. In an oral ruling on August 31, 1972, the Court found the film "School Girl" to be obscene within the meaning of the applicable authorities and authorized the seizure of the film with regard to the investigation of a possible violation of 18 U.S. Code §1462.

An appeal has been taken on the actions of the Court concerning the procedure for obtaining the film and the finding of obscenity with regard to it.

On September 11, 1972, the Grand Jury in this district returned a one count indictment charging the Guild and Arnold Jordan with using on or about March 3, 1972, the Novo Air-Freight Company, a common carrier, for transporting in interstate commerce from New Jersey to Tennessee, one copy of "School Girl", an obscene motion picture film.

On September 28, 1972, the complaint in this cause was filed pursuant to 28 U.S.C. §1331 for the primary purpose of seeking an injunction against the defendants from seeking the production of other copies of the film

"School Girl" through subpoenas issued to certain firms and persons thought to have possession of prints of the film. At that time the subpoenas had been prepared by the defendant Parrish and issued for production of records pertaining to the film "School Girl" and additional prints of the film for presentation to the Grand Jury of this District on October 13, 1972. In addition to the original application for injunctive relief in this cause there were pending in this District motions to quash these subpoenas. On October 6, 1972, this Court conducted a hearing on the motions to quash and the application for injunctive relief. No oral testimony was offered. The Court ruled that the application for injunctive relief would be considered a motion to quash the subpoenas and that pursuant to Rule 17(c) F. R. Crim. P. the Court would quash the subpoenas insofar as it required the production of prints of the film. The Court overruled the motion to quash the production of records pertaining to the film "School Girl" and directed that the persons and firms who were served with subpoenas should retain in their actual or constructive possession any prints, negative or positive of the film and not alter or destroy any copy of the film. Those persons and firms were also directed to keep a complete record of where the film was kept or sent so that the whereabouts of copies of the film could be determined for production of the film upon order of the Court.

On November 1, 1971, Ralph J. Schwartz, Jr., Esq., and Michael Pleasants, Esq., appeared in the chambers of this judge for the purpose of seeking relief with regard to the cessation of search and seizure warrants issued in other districts for the negative of the film in New York and prints in other areas. The defendant Parrish was also present on that occasion, and as a result of a conference the Court directed counsel for the plaintiffs to amend the complaint to reflect what had transpired since the Court's ruling of October 6, 1972, pertaining to Sub-

poena *Duces Tecum* with regard to prints of the film. On November 3, 1972, a supplemental motion for preliminary injunction was filed in the cause. Attached thereto was an affirmation of Ralph J. Schwartz, Jr., accompanied by an unsigned affidavit for a search warrant prepared for presentation to a Magistrate in Los Angeles, California and a search warrant issued pursuant to the affidavit authorizing a seizure of the film at the Cinema Theatre in Los Angeles, California; and a search warrant issued by a Magistrate in the Southern District of New York authorizing the seizure by the FBI of the negative of the film "School Girl" from the executive offices of Movie Labs, Inc. in New York City. The affidavit pertaining to the Cinema Theatre indicated that this Court had adjudicated the movie "School Girl" as obscene, that documentary evidence submitted under oath to the Grand Jury in this District established that there existed twenty positive prints and a negative of the film distributed nationwide by Sherpix and that an indictment had been returned against the Guild and Arnold Lawrence Jordan charging a violation of 18 U.S.C. §1462. The search warrant issued pursuant thereto recites that the film entitled "School Girl" was evidence of a conspiracy to violate Title 18, U.S.C. §1462 and §1465. There was attached to the affidavit the application for a show cause presented to this Court with the accompanying affidavit of Joe C. Hoester, Special Agent of the FBI, and a copy of this Court's Judgment on the issue of obscenity with regard to the film "School Girl".

The return of the warrant authorizing the search and seizure from Movie Labs, Inc., indicates that the negatives of the film entitled "School Girl" from which all prints are made, were seized. Also certain records were seized. The affirmation of Ralph J. Schwartz, Jr., reflects that a print of the film was seized from Cinema Theatre in Los Angeles, California and that seizures were made at Bonded Film Storage Company, Fort Lee, New Jersey

and Independent Film Service in Minneapolis, Minnesota. At the hearing on the present motion the defendant Parrish stated that there is thought to be twenty-two prints of the film and that ten or twelve of the prints had been seized. Apparently more than one copy of the prints were seized at some of the locations.

On November 10, 1972, the defendant Parrish filed a thirty-three page Memorandum of Points and Authorities in opposition to plaintiff's Motion for Preliminary Injunction. On November 14, 1972, Michael Pleasants, Esq., filed a brief in furtherance of the motion for a preliminary injunction which was styled "An Overview". On November 22, 1972, plaintiffs filed a reply memorandum in support of motion for a mandatory injunction for return of property illegally seized. On November 24, 1972, the date the Court had set for a hearing at 2:00 P.M. on the Motion for Preliminary Injunction, Michael Pleasants, Esq., at 11:15 A.M. filed an Amended and Supplemental Complaint seeking to add as defendants Patrick Gray, Director of the FBI and two Special Agents in the Memphis Office of the FBI. At 1:45 P.M. a Motion to Dismiss or in the Alternative for Summary Judgment was filed in behalf of defendants Turley and Parrish by J. N. Raines, another Assistant U. S. Attorney for this district. That motion asserts that no relief should be granted in this case because the defendants acted within the scope of their official positions and were therefore authorized to do so by law. The defendants also moved that the Court stay the application for a preliminary injunction pending a determination of the Motion to Dismiss. The Court overruled the Motion to Stay the Hearing and indicated that the affidavits in support thereof would be considered on the issues pertaining to the Motion for Preliminary Injunction previously filed and set for hearing on that date in this Court. No oral proof was offered at the hearing therefore this ruling is based upon the record in the cause and relevant portions of the record in the other cases pending in this district.

In furtherance of the application for the preliminary injunction and by way of response to the reply of the defendants the plaintiffs assert three primary contentions. First, the plaintiffs assert that the defendants violated this Court's October 6, 1972, ruling by procuring the seizure of the films by warrant after the Court quashed the production of copies of the film by subpoena to the Grand Jury. Secondly, plaintiffs contend that the action of the defendants is a suppression by massive seizure which is prohibited when first amendment rights are in issue. This contention raises the question of the necessity for a separate adversary proceeding and ruling on the issue of obscenity when seizure of the prints of the film is sought before judicial officers in other districts. Third, the procedure of a separate plenary action against the defendants authorizes this Court to grant the relief sought.

Separate pre-indictment actions may be brought in District Court against federal officials for injunctive relief and return of illegally seized property, pursuant to 28 U.S.C. §1331 and Rule 41(e) F. R. Crim. P. The jurisdiction in Rule 41(e) suits rests upon the courts supervisory power over the actions of law enforcement officials, but the jurisdiction is to be exercised with great restraint and caution. *Fifth Avenue Peace Parade v. Hoover*, 327 F. Supp. 238 (S.D.N.Y., 1971).

Because all of the issues in this case pertain to possible criminal prosecutions under the laws of the United States, more particularly 18 U.S.C. §1462 and §1465 and 18 U.S.C. §371 (the conspiracy section), the applicability of the Federal Rules of Criminal Procedure must be considered. At all times since the issuance of the warrants complained of herein, Rule 41(e) of F. R. Crim. P., as amended October 1, 1972, provided as follows:

> (e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may

> move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Rule 41(e) contemplates a separate plenary action for a return of property when the issues complained of do not address themselves to a pending criminal procedure. Sherpix is not a defendant in any criminal proceeding in this district, therefore, under the existing rule it would be subject to the portion of the rule pertaining to a person aggrieved by an unlawful search and seizure which was allegedly illegally seized in other districts. Rule 41(e) contemplates a hearing on any issue of fact necessary to the decision of the motion. In the opinion of this Court this would include proof which could form the basis for a finding whether or not the Guild and Sherpix are so closely identified that the prior determination of obscenity was binding upon Sherpix and if not whether or not a separate adversary hearing is required with regard to the copies of the film allegedly seized in another district. Similarly, one of the issues would be a determination of whether or not the copy of the film in question was evidence of the commission of a crime under the laws of the United States including a conspiracy prosecution or otherwise meets the criteria for property which may be seized as set forth in Rule 41(b) F. R. Crim. P.

With regard to that portion of the rule which pertains to a motion for return of property which is made or comes on for hearing in the district of trial after an indictment is filed this Court concludes, first, that there has been no indictment filed which would make copies of the film from other districts relevant to the pending proceedings. In this regard the Guild has been indicted only with regard to the alleged transportation of the one copy of the film which is presently under a seizure warrant after an adversary proceeding. Therefore, the Court concludes that the issues presently before the court pertaining to seizures in other districts do not address themselves to a motion contemplated by the last sentence of Rule 41 (e).

As previously indicated the plaintiffs seek injunctive relief upon a contention that the request for procurement for search warrants of other copies of the film in other districts by the defendant Parrish constitutes a violation of this Court's ruling of October 6, 1972, wherein the Court quashed the production of copies of the film by subpoena *duces tecum*. This contention addresses itself to the motives and purpose of the defendants in seeking possession of the prints of the film. In this regard plaintiffs assert that the motive and purpose of the defendants is to deprive the plaintiffs of the use of the film and thereby violate their First Amendment rights while the controverted issue of whether or not "School Girl" is obscene as found by this Court is reviewed. This addresses itself to the principle of law referred to in *American News Company vs. Ladas*, 454 F. 2d 1237 (C. A. 6 1972) wherein the Court noted that the District Judge made no finding on the issue of bad faith or harassment.

The defendants contend that the efforts of the defendant Parrish with regard to possession of the film have been in furtherance of their official responsibilities as U. S. Attorney and Assistant U. S. Attorney for the Western District of Tennessee. With regard to the possession of

the prints of the film in other districts the defendant Parrish admits that he was a participant in the procurement of the search warrants and further contends that the procedures followed were valid means of obtaining evidence in connection with prosecutions in this district.

In order to set forth the present ruling of the Court, it is necessary for this Court to explain its reasoning with regard to past rulings. It should be noted that the original application for a show cause order to obtain possession of the film "School Girl" in this Court was based upon the contention by the Government that those interested in the film were entitled to an adversary hearing before the film could be seized for use as evidence in an investigation and prosecution. This Court agreed with the principle that persons interested in the film were entitled to an adversary hearing before the film was released to the FBI, U. S. Attorney and the Grand Jury for appropriate use in the consideration of a probably criminal violation, and a full adversary hearing was granted. Subsequent thereto an indictment was returned with regard to the single copy seized pursuant to the adversary proceeding.

At the time that this Court considered the procurement of other copies of the film by subpoena *duces tecum* returnable to the Grand Jury at the request of the U. S. Attorney's office, this Court could not find sufficient grounds to authorize the production of the film at that stage of the investigation and, therefore, this Court quashed the subpoenas to that extent. The Court did authorize and require the production of records which might be considered by the Grand Jury in furtherance of an alleged conspiracy with regard to the transportation in interstate commerce of the movie "School Girl". The Court's reasoning was based in part upon the fact that prints of these movies were sought from persons and firms who had not participated in the adversary hearing with regard to the single copy of the film. In

this regard the Court was concerned because of the possibility that numerous copies of the film would be taken out of circulation while a review was being sought of this Court's ruling with regard to the procedure for seizing the film and a finding of obscenity. The Court was not unmindful of the many different rulings in the various districts and circuits with regard to the conflict between First Amendment and Fourth Amendment rights.

With regard to the present changed circumstances the Court notes certain principles of law. A massive seizure of all copies of certain books in the possession of one firm without a prior adversary hearing was held to be constitutionally deficient in *A Quantity of Books v. Kansas*, 378 U. S. 205 (1964). That case has been construed to require an adversary hearing prior to the seizure of a single movie. *Bethview Amusement Corporation v. Cahn*, 416 F. 2d 410 (C. A. 2 1969); *Mod Amusement Company v. Murphy*, 335 F. Supp. 1267 (S.D.N.Y. 1972).

In *Bethview* the defendant District Attorney contended that a print of the motion picture was needed for purposes of prosecution. The Court noted that this could be handled prior to the adversary hearing in a number of ways without the seizure of the film, such as directing that a print be made available to the prosecution or the issuance of a subpoena *duces tecum*. The Court further noted that removal of the film for alteration of the offending portions could be controlled by an *ex parte* restraining order. Similarly in *American News Co. v. Ladas, Supra*, at Page 1240, the Sixth Circuit noted that a District Judge might preserve for prosecution allegedly offending materials without a prior adversary hearing by ordering that the possessor make available to the prosecution a single copy of each of the materials.

By its earlier ruling on the issue of obscenity with regard to the movie "School Girl", this Court did not intend to deprive persons in possession of the film who were

not parties to the suit in this Court wherein that issue was considered, of being heard in an adversary proceeding. On the other hand, insofar as the relevancy of the movie "School Girl" to proceedings in this Court can be established with regard to other copies of the film, the Guild has had an adversary hearing which is binding on it. There is insufficient proof in the record in this cause to show a sufficient connection between the Guild and Sherpix to make the former adversary hearing binding upon Sherpix. However, the Court notes that Sherpix was the owner of the copy of the film which this Court authorized seized presumably in the same fashion that Sherpix owns all other copies of the film. The Court also notes that the Court ordered that personal service be had upon Bonded Film Storage Company, Fort Lee, New Jersey, that a show cause hearing on the issue of obscenity had been ordered for May 30, 1972. (Order to Show Cause in case No. C-72-179 issued by this Court May 26, 1972).

With regard to the right to the return of property allegedly illegally seized pursuant to a warrant the burden of proof is upon the person seeking the return of the property. Because the plaintiffs have not carried the burden of proof with regard to any issue of harassment or bad faith on the part of the defendants the Court concludes that no preliminary injunction should issue. In this regard the Court notes that a blanket restraint on the U. S. Attorney against attempts to obtain evidence in furtherance of bona fide investigations and prosecutions for violations of the United States laws would be equally as repugnant as authorizing a massive seizure without a prior adversary hearing. The Court expects the office of the U. S. Attorney and the Grand Jury not to abuse their powers by obtaining possession of controverted obscene films for the purpose of depriving the public of seeing the films and thereby effectively

becoming a national censor. The laws of the United States in question prohibit the interstate transportation of obscene films and all investigations and prosecutions in furtherance thereof should be limited to the issues pertaining to violations of the United States laws. Any material which is not relevant and necessary evidence to the prosecution must not be seized or should be returned promptly if found to be unnecessary after a good faith seizure.

In summary the Court concludes that the application for a preliminary injunction should be denied. The cause will be retained for further proceeding including a hearing on the Motion to Dismiss or Motion for Summary Judgment after responses are made.

(Illegible.)
United States District Court

APPENDIX D.

United States Constitution and Statutes Involved.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause of the Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law.

UNITED STATES CODE:

Title 18, Section 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18, SECTION 1462

§ 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

APPENDIX E.

Charging Part of Count One of Indictment in *United States v. Gerber, Sherpix, et al.*, Cr. No. 73-45.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION.

UNITED STATES OF AMERICA

v.

PAUL DAVID GERBER, *et al.*

Cr. No. 73-45

18 USC, §1462

18 USC, §2

18 USC, §371

Indictment.

THE GRAND JURY CHARGES:

COUNT ONE

From on or about some point in time shortly prior to the 1st day of August 1971 up to and including the 1st

day of November 1972 in the Western District of Tennessee and divers other places.

Paul David Gerber
a/k/a David Reberg
Richard Lewis Miller
a/k/a R. L. Mills
Louis K. Sher
Arnold Jordan
Tom Berman
Sherpix, Inc.
Art Theater Guild, Inc.
Ellis Gordon
Marvin Friedlander
Marvin Films, Inc.
Gordon Craddock
Gordon Craddock Films, Inc.
Martin Zide
Allied Film Exchange, Inc.
Jerome Sandy
American International Pictures
Exchange of Washington, D. C., Inc.
Abbott Martin Swartz
Independent Film Distributors, Inc.
Emanuel Youngerman
M. Y. Film Co., Inc.
John O. Glaus
John O. Glaus Agency
Lou Wolfe
Harry Brandt Booking Office, Inc.
and
Bernard Levy

hereinafter referred to as defendants, and Saul Shiffrin, Bonded Film Services, Inc. and Movielab, Inc., and others whose names to the Grand Jury are unknown, named herein as co-conspirators but not as defendants, unlawfully combined, conspired, confederated, agreed and

planned to engage in conduct against the United States by knowingly using express companies and other common carriers for carriage in interstate and foreign commerce and knowingly taking from such express companies and other common carriers an obscene, lewd, lascivious and filthy motion picture film entitled "School Girl" (hereinafter referred to merely as "School Girl"), which said planned acts were then prohibited by Title 18, United States Code, §1462.

The ultimate object of said combination, conspiracy, confederation, agreement and plan was to profit financially the defendants and others by the public exhibition of said motion picture film to paying patrons of theaters throughout the United States. Other objects of said combination, conspiracy, confederation, agreement and plan, designed primarily to attain and enhance the ultimate objective, included obtaining wide notoriety and acclaim for said motion picture film and making all necessary business arrangements to physically place a copy or print of said motion picture film in the possession of theaters for exhibition to the public. Further, the defendants and co-conspirators not named as defendants at various times shipped by use of common carriers prints of "School Girl" to, by, between and among themselves as well as other persons and business entities, and received from common carriers prints of "School Girl" as shipped.

APPENDIX F.

Charging Part of Count One of the Indictment in *United States v. Hamling*.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF CALIFORNIA,

November 1969 Grand Jury.

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM L. HAMLING, *et al.*

No. 10791

The Grand Jury charges that:

COUNT 1

(Title 18, U.S.C., Section 371)

From on or about September 11, 1969, and continuously thereafter up to and including the date of the filing of this indictment, defendants William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Greenleaf Classics, Inc., a California corporation formerly known as Phenix Publishers, Ltd., Reed Enterprises, Inc., a California corporation formerly known as Reed Enterprises, and Library Service, Inc., a Nevada corporation also known as Library Services, Inc., and formerly known

as Reed Enterprises, Inc., did in the Southern District of California and elsewhere willfully and knowingly conspire, combine, collaborate and agree together and with each other and with London Press, Inc., North Hollywood, California, Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, North Hollywood, California, and Richard Harte and Venita Harte, doing business as Academy Addressing & Mailing Service, North Hollywood, California, named herein as unindicted co-conspirators, and with diverse other persons whose names are to the Grand Jury unknown, to violate certain laws of the United States, to wit, Section 1461, Title 18, United States Code, all in violation of Section 371, Title 18, United States Code.

It was a part of the said conspiracy that the defendants would knowingly use the United States mails for the mailing and carriage in the mails, and knowingly cause to be delivered by mail, certain non-mailable matter, to wit, obscene advertisements, obscene books, and advertisements giving information as to where, how, from whom, and by what means said obscene books might be obtained.